

SCHEDULING HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification)	Docket No.
for the El Segundo)	00-AFC-14
Modernization Project)	
_____)	

CALIFORNIA ENERGY COMMISSION
HEARING ROOM B
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

THURSDAY, APRIL 11, 2002

9:04 a.m.

Reported by:
Peter Petty
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Robert Pernell, Presiding Member

HEARING OFFICER AND ADVISORS

Garret Shean, Hearing Officer

Ellen Townsend-Smith, Advisor to Commissioner
Pernell

STAFF AND CONSULTANTS PRESENT

David Abelson, Senior Staff Counsel

James W. Reede, Jr., Project Manager

Joseph M. Loyer

Michael Foster

Rick York

Kevin Kennedy

Bill Kanemoto

Noel Davis

APPLICANT

John McKinsey, Attorney,
Kimberly J. Hellwig, Energy Regulatory Analyst
Livingston and Mattesich

Ron Cabe, Senior Director, Project Development
Dynegy Marketing and Trade

Tim Hemig, Manager, Environmental Services
NRG Energy, Inc.

Timothy J. Murphy, Environmental Project Manager
URS Corporation

INTERVENORS

Laurie Jester
Robert Wadden
City of Manhattan Beach

Lyle Cripe

ALSO PRESENT

Michele Murphy

Tom Luster
California Coastal Commission

Pat Stitzenberger, Community Relations

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I N D E X

	Page
Proceedings	1
Introductions	1
Opening Remarks	3
Overview	3
Position Presentations	3
CEC Staff	3
Applicant	28
Comments	60
R. Wadden, City of Manhattan Beach	61
Summary	62
Schedule	62
Adjournment	63
Reporter's Certificate	64

P R O C E E D I N G S

9:04 a.m.

HEARING OFFICER SHEAN: This is a hearing on the El Segundo Modernization project application for certification. I'm Garret Shean. To my left is Commissioner Robert Pernell who is Presiding Member; and to his left, Ellie Townsend-Smith, his Advisor.

I'd like to have the applicant and staff identify themselves, and then we'll have people who are on the telephone identify themselves.

MR. MCKINSEY: Thank you. My name is John McKinsey and I'm the Project Counsel for El Segundo Power Redevelopment. On my right is Ron Cabe from El Segundo Power. And on my left is Tim Hemig from NRG. And also with me today is Tim Murphy from URS. He's the URS Environmental Project Manager. He's outside the room right now. And also Kim Hellwig from my office.

MR. REEDE: Good morning, Commissioner Pernell and Hearing Officer Shean. My name is James Reede. I'm the Energy Facilities Siting Project Manager assigned to the environmental review of the application for certification for the El Segundo Power Plant.

1 We have with us also Senior Staff
2 Attorney David Abelson. We have technical staff
3 Mike Foster for biological resources; and Rick
4 York for biological resources. We have Mr. Joseph
5 Loyer, our air resources engineer. And we have
6 the Program Manager for the Siting Division, Mr.
7 Kevin Kennedy.

8 HEARING OFFICER SHEAN: Okay. Why don't
9 we now have anyone on the phone identify him- or
10 herself, please.

11 MR. KANEMOTO: Bill Kanemoto.

12 HEARING OFFICER SHEAN: And can you tell
13 us your affiliation, as well.

14 MR. KANEMOTO: Consultant to the CEC.

15 MS. DAVIS: I'm Noel Davis; I'm marine
16 biological consultant for the CEC.

17 MR. LUSTER: Tom Luster, Coastal
18 Commission.

19 MS. MURPHY: Michele Murphy, citizen.

20 MR. CRIPE: Lyle Cripe, Intervenor.

21 MS. STITZENBERGER: Pat Stitzenberger,
22 community relations for the project.

23 MR. REEDE: The name was Lyle Cripe,
24 C-r-i-p-e, Intervenor.

25 MR. WADDEN: Bob Wadden, City Attorney

1 for City of Manhattan Beach, Intervenor.

2 MS. JESTER: And Laurie Jester, City of
3 Manhattan Beach.

4 MR. REEDE: Wadden is spelled
5 W-a-d-d-e-n, Robert.

6 HEARING OFFICER SHEAN: Okay, that has
7 all of us. Let me indicate for those of you who
8 are on the telephone that we have two written
9 submittals that were filed on April 8th. One is
10 from the applicant, a letter to Commissioner
11 Pernell; and the second is from the Commission
12 Staff, a status report number three.

13 And I think what we'll do is have the
14 staff proceed with its comments, since they will
15 tend to overarch those of the applicant on matters
16 in terms of the motion to compel and proposed
17 schedule.

18 We'll go ahead and do that, and then
19 take comments, questions from the Committee and
20 comments from those of you who are
21 teleconferencing. So, with that we'll go to the
22 Commission Staff.

23 MR. REEDE: Thank you, Hearing Officer
24 Shean and Commissioner Pernell. My name, again,
25 is James Reede.

1 Since the Committee issued a schedule on
2 December 3rd of last year the staff has received
3 critical path items from the applicant. Many of
4 these items were delivered after the original due
5 date; however, we have received all the critical
6 path items including the final determination of
7 compliance from South Coast Air Quality Management
8 District.

9 We issued data requests according to the
10 schedule on February the 6th, and the applicant
11 subsequently submitted responses or objections to
12 data requests. The most recent data responses
13 were submitted yesterday.

14 Staff has worked diligently towards
15 completion of the supplement to the staff
16 assessment and has now completed most of the
17 sections requiring additional testimony except for
18 two critical areas, well, actually three critical
19 areas. The significant issues that remain include
20 biological resources.

21 Now, the applicant has an existing
22 National Pollution Discharge Elimination System
23 permit that was issued by the L.A. Regional Water
24 Quality Control Board in the year 2000; it will be
25 up for renewal in three years.

1 However, Regional Water Quality Control
2 Board Staff acknowledges that a federal Clean
3 Water Act section 316B study that was performed by
4 Southern California Edison in 1982 was relied upon
5 for the last renewal.

6 This particular study was not performed
7 at the El Segundo facility, but was a proxy study
8 performed approximately 20 years ago at another
9 plant 55 miles from the proposed project site. No
10 formal 316B study has ever been performed at the
11 intake structures in question in this proceeding.

12 The Regional Water Quality Control Board
13 Staff also informed Energy Commission Staff during
14 an interagency meeting in January that the
15 Regional Board has no existing entrainment data
16 from the project intake, nor to its knowledge has
17 any ever been collected.

18 Even though they do have an NPDES permit
19 the L.A. Regional Water Quality Control Board has
20 deferred to the Energy Commission on the CEQA
21 issues relating to entrainment and impingement for
22 this AFC.

23 Now, approximately 16 months ago when
24 this proceeding began staff identified the need
25 for and requested the applicant to perform a one-

1 year biological entrainment and impingement study
2 at the existing intake. This was to be
3 accomplished using a study protocol similar or
4 identical to that normally used when conducting
5 such studies under the federal Clean Water Act.

6 The applicant was then and remains
7 unwilling to perform biological analyses the staff
8 has requested. Instead the applicant offers to
9 submit a surrogate report by mid August of 2001.
10 The applicant submitted a report December of 2001
11 titled, supporting impact analysis of entrainment
12 and impingement.

13 That report is based primarily on data
14 collected at locations other than the actual
15 intake structure at issue in this proceeding; and
16 relies on protocols which are significantly
17 different from those currently used in 316B
18 studies.

19 Upon receipt of the entrainment report
20 staff prepared and submitted data requests as
21 authorized by the Committee. And the applicant
22 initially objected to most of these data requests,
23 but has since provided answers at various times to
24 virtually all the questions that staff had asked.

25 I will let senior staff counsel address

1 the motion to compel when we get to that point.

2 After carefully reviewing the
3 information provided to date by the applicant,
4 staff has determined that the applicant's
5 submittals do not provide a sound scientific basis
6 for concluding that the proposed project will not
7 cause significant adverse biological impacts
8 related to entrainment at the existing intake
9 structure.

10 Working with sister agencies and federal
11 agencies, they have also evaluated the applicant's
12 entrainment report. And the National Marine
13 Fisheries sent a letter that was docketed
14 yesterday asking that a 316B study be performed.

15 The California Coastal Commission, on
16 this past Tuesday, basically said that the plant
17 is inconsistent with the Coastal Act in the area
18 of biological resources because they do not have
19 data to show that there are no impacts.

20 And the Department of Fish and Game will
21 be delivering their letter tomorrow also
22 supporting Energy Commission Staff's contention
23 that a 316B study needs to be performed.

24 So we have additional sister agencies
25 and a federal agency all saying that the

1 applicant's entrainment report does not have a
2 sound scientific basis for concluding that there
3 are no impacts, and also requesting that a 316B-
4 like study be performed.

5 Due to the concerns over the lack of a
6 valid 316B-like study to support the continued use
7 of once-through cooling at the proposed facility,
8 staff has begun an alternative cooling option
9 study that could identify feasible methods to
10 lessen or eliminate the potential aquatic
11 biological impacts all together. When we are
12 completed, staff will file this report for review
13 and comment with various agencies and with all
14 parties.

15 However, at this time, staff's
16 supplement to the biological resource section is
17 not complete.

18 In summary, unless and until an adequate
19 316B-like entrainment study is performed by the
20 applicant staff cannot recommend approval of the
21 project as it is now proposed.

22 As a procedural matter, if the Committee
23 orders the applicant to perform the study in
24 question, staff is willing to bifurcate the
25 biological resources section of the supplement to

1 the staff assessment, and proceed with the
2 remainder of this case while awaiting the results
3 of that biological study.

4 In the area of air quality the final
5 determination of compliance was issued February
6 14, 2002. Staff is completing its supplement to
7 the staff assessment, and at this point is unable
8 to recommend approval of the project due to
9 significant and unmitigated PM10 emissions
10 impacts. Impacts that have not been resolved, and
11 I'm bringing Joe Loyer to the microphone, include
12 direct project PM10 impacts stemming from a South
13 Coast rule 1304 implementation.

14 Now, this rule allows exemptions from
15 standard District offset rules when there is a
16 replacement of a utility boiler with a combustion
17 turbine. This rule requires the applicant to only
18 offset 45 percent of the emissions based on the
19 increase of capacity.

20 This exemption, however, does not
21 abrogate the Commission's CEQA certification
22 responsibilities.

23 Number two cumulative PM10 impacts
24 stemming from the project and the adjacent Chevron
25 refinery, MTBE -- unit change upgrade. The

1 Chevron project is due to the MTBE ban
2 implementation, and ethanol changeover, and does
3 not have full mitigation, either.

4 And finally, the projections and high
5 potential of secondary PM10 generation from an
6 excess of unmitigated SOx emissions.

7 I've called Mr. Loyer up because he's
8 been working closely with the South Coast Air
9 Quality Management District and has a further
10 update on the discussions to attempt to resolve
11 the PM10 emissions. And I'd like him to give a
12 very brief summary and report of what's occurring
13 before I go on to the next issue.

14 MR. LOYER: Thank you. My name is Joe
15 Loyer. I'm from the California Energy Commission,
16 working on air quality. I've been dealing with
17 the PM10 and SOx shortfall that we found, and that
18 Mr. Reede has described.

19 Primarily what I've been doing is trying
20 to seek out further mitigation from the District
21 through District programs that are existing and
22 under the District management, or under their
23 surrogate management, that are simply lacking
24 funding, and that would result in PM10 emission
25 credits, or PM10 emission reductions.

1 The results of those discussions have
2 yielded a possibility from the District. However,
3 recent discussions with the District have -- it
4 has come to my attention that essentially the
5 District finds themselves that they are not
6 obligated to provide this mitigation for us, or
7 manage this mitigation for us. And are, at this
8 juncture, reconsidering whether they want to be
9 involved in that management at all.

10 They are proposing that the applicant
11 provide that management and provide those emission
12 reductions themselves, and not use the District
13 processes.

14 There have been several possibilities
15 that have presented themselves, most of which
16 exist outside of the three-city area of Manhattan
17 Beach, El Segundo and Hawthorne. Some of them
18 near that area are tug boats that operate out of
19 the Chevron refinery.

20 However, after making some initial
21 calculations, we found that while we would get a
22 significant NOx emission reduction from
23 modifications we would make to those engines on
24 the tug boats, we wouldn't get that significant a
25 PM10 emission reduction.

1 So, at this juncture we are still
2 searching out mitigation within the District. We
3 haven't gotten the entire shortfall which is, I
4 calculated it at 158 pounds a day.

5 To that end we just had a short meeting
6 with the applicant's representatives to discuss
7 possibilities of where else we might look, what
8 other avenues we might search out. And some other
9 things have presented themselves that may bear out
10 better on the project. At this point it's a
11 little too early to discuss those. They are just
12 possibilities.

13 MR. REEDE: Okay, so in other words
14 right now the project is still unmitigated for
15 PM10s?

16 MR. LOYER: The project is still
17 unmitigated for PM10 and SO2.

18 MR. REEDE: Okay. So at this time we
19 still cannot recommend approval for the project
20 based on the air quality issues outstanding.

21 MR. LOYER: That is correct.

22 MR. REEDE: Okay, thank you.

23 PRESIDING MEMBER PERNELL: Question.
24 This is Commissioner Pernell. The District in
25 this case is the South Coast Air Quality

1 Management District?

2 MR. LOYER: That's correct.

3 PRESIDING MEMBER PERNELL: And have they
4 issued a permit?

5 MR. LOYER: They're not permitted to
6 issue a permit until the Commission decision has
7 been issued. That's in their rules and regs.

8 PRESIDING MEMBER PERNELL: So have they
9 done a --

10 MR. REEDE: We do have a FDOC,
11 Commissioner Pernell, final determination of
12 compliance.

13 PRESIDING MEMBER PERNELL: From the
14 District?

15 MR. LOYER: Um-hum.

16 MR. REEDE: From the District.

17 MR. LOYER: Yes.

18 MR. REEDE: But the permit cannot be
19 issued until after we get a Commission decision.
20 And that's basic standard operating procedure.

21 PRESIDING MEMBER PERNELL: Right, right,
22 no -- but usually when they do a FDOC they have
23 evaluated the project and it's given the
24 preliminary go-ahead, I guess.

25 MR. REEDE: Yes.

1 MR. LOYER: Yes.

2 MR. ABELSON: But, Commissioner, if I
3 might add just for clarification, their evaluation
4 is based on their local rules and ordinances and
5 statutes that they need compliance with. That's
6 what they're evaluating it for. And if I
7 understood correctly, what staff is basically
8 saying is that because of a particular rule, which
9 in the area is relatively relaxed, if I can use
10 that way of describing it, staff believes that
11 under a --

12 PRESIDING MEMBER PERNELL: And that's
13 the 45 percent that --

14 MR. ABELSON: Right.

15 PRESIDING MEMBER PERNELL: -- was raised
16 --

17 MR. ABELSON: -- staff believes that
18 under our CEQA analysis, which is a separate
19 obligation that we have, as the staff and the
20 Committee and Commission have, there's still a
21 potential significant impact.

22 PRESIDING MEMBER PERNELL: Okay.

23 MR. REEDE: Thank you, Joe.

24 I'm going to go quickly through visual
25 resources, noise and soil and water, because we

1 need to get back to biology because one of our
2 biological resources staff members is on the phone
3 and has to leave.

4 Visual resources, there's still a number
5 of visual resource issues outstanding. The
6 Coastal Commission made a finding at its March
7 2002 meeting that the area is visually degraded,
8 and the project, as now proposed, is inconsistent
9 with the Coastal Act.

10 This requires the applicant to enhance
11 the visual quality of the project. And the issues
12 still needing resolution are the architectural
13 treatment of the facility; tank farm plan; and
14 photographic renderings necessary to complete an
15 analysis of the remaining issues.

16 Additionally, the City of Manhattan
17 Beach filed a motion to compel applicant's
18 response to these issues. And that has yet to be
19 resolved.

20 Now, staff held a visual and noise
21 workshop in El Segundo to further address these
22 two issues. And the applicant has proposed to
23 submit new visual information by May 10th. Staff
24 proposed to hold an issues workshop in El Segundo
25 within approximately two weeks of the submittal to

1 take public input.

2 On the issue of noise, staff has
3 completed its noise supplement; and the February
4 2002 workshop was extremely productive in
5 identifying the remaining issues and their
6 resolutions to staff's satisfaction.

7 In the area of soil and water the staff
8 assessment of June 15th identified the need for
9 the project to conform with California Water Code
10 section 13550, which requires the use of reclaimed
11 water where available.

12 Now, based on the outcome of the
13 alternative cooling analysis currently being
14 performed, the issue may change relating to
15 reclaimed and potable water usage. Staff will
16 revisit the project design to determine
17 compliance.

18 And I might add that we just received
19 yesterday additional data responses on the soil
20 and water issues. So that particular section is
21 still a ways away from being -- well, is still not
22 complete.

23 Additionally, the Coastal Commission
24 will be addressing the remaining project issues
25 most likely at their either May or June meeting.

1 There are a number of interested parties
2 in the Cities of El Segundo and Manhattan Beach
3 that have been following the issues closely.

4 Going back to biological resources, I
5 must note that in the original staff assessment
6 issued June 15th of last year there were a number
7 of conditions of certification in the biological
8 resources section. All of those conditions of
9 certification previously proposed by staff have
10 been withdrawn at this point until we issue a new
11 biological resources section. We cannot support,
12 based upon the discovery of either a lack of
13 evidence or new evidence, those conditions of
14 certification that we had originally proposed.

15 MS. TOWNSEND-SMITH: I'm sorry, Ellie
16 Townsend, Energy Commission. I've never heard of
17 that before. So you took all the conditions out
18 of the biological section?

19 MR. REEDE: No. We had proposed that
20 certain things be done in a certain sequence in
21 the conditions of certification.

22 MS. TOWNSEND-SMITH: Okay.

23 MR. REEDE: We are now saying that that
24 biological resources section that we had
25 originally put in the staff assessment is no

1 longer valid. And we can no longer recommend the
2 plant for approval with certain conditions of
3 certification.

4 PRESIDING MEMBER PERNELL: For that
5 section?

6 MR. REEDE: For that section only. So
7 biological resources, we're re-doing our
8 biological resources section. There will be new
9 conditions of certification. But the original
10 conditions of certification are no longer on the
11 table for discussion purposes.

12 MS. TOWNSEND-SMITH: In other words,
13 there's no way to mitigate the project using those
14 particular conditions?

15 MR. REEDE: Correct.

16 MS. TOWNSEND-SMITH: Okay.

17 MR. REEDE: Now, Commissioner Pernell,
18 with your permission I'd like to have our staff
19 attorney discuss the motion to compel.

20 PRESIDING MEMBER PERNELL: Go ahead,
21 okay.

22 MR. ABELSON: Yes, Commissioner, and
23 Hearing Adviser Shean, I'm pleased to report that
24 after several exchanges of conversation with the
25 attorney for applicant the motion to compel is

1 effectively moot.

2 The applicant has been forthcoming with
3 most, if not all, the information that staff had
4 originally sought. There's a small amount of
5 additional information Mr. McKinsey has assured me
6 this morning will be forthcoming within the next
7 day or so, few days. And I have every reason to
8 believe that that will actually be the case.

9 So the motion to compel, as far as staff
10 is concerned, is moot at this point.

11 PRESIDING MEMBER PERNELL: Are you
12 withdrawing that?

13 MR. ABELSON: Depending on what Mr.
14 McKinsey says, the answer would be yes.

15 PRESIDING MEMBER PERNELL: Okay.

16 MR. REEDE: Staff has proposed a
17 schedule. It's contained on our last page. We
18 have been tolling since the initial objections
19 were filed February 19th schedule day for day.

20 If you go to the bottom half of the page
21 we've identified two critical path items that are
22 still required from the applicant. The first one
23 is visual proposal, and we require 45 days from
24 the date of that submittal to number one, hold a
25 workshop in the community so the community and

1 intervenors have input and comment.

2 And then we would produce a supplement
3 to the staff assessment approximately 30 days
4 after that workshop.

5 The other critical path item is the 316B
6 study if it's required by the Committee.
7 Obviously if the Committee requires a 316B study
8 we're looking at a year out.

9 The other dates that are shown, the
10 original dates that were in the Committee order of
11 December 3rd had the schedule on the left column.
12 Our proposed dates are the schedule on the right
13 column, based upon the delivery of those critical
14 path items.

15 HEARING OFFICER SHEAN: And are we in
16 accord that the, at least with the visual
17 proposal, that's to be May 10th, is that right?

18 MR. REEDE: That's what we were
19 informed, on or before May 10th. So, whatever day
20 it is, 45 days -- well, applicant's attorney has
21 informed me that he will give me a couple days
22 notice prior to it being actually submitted so
23 that I can send out the workshop notice so that we
24 have statutory noticing time, and be able to move
25 it as quickly as possible.

1 And that concludes our comments at this
2 point.

3 PRESIDING MEMBER PERNELL: I have a
4 couple questions.

5 HEARING OFFICER SHEAN: Okay.

6 PRESIDING MEMBER PERNELL: I guess this
7 question -- this is Commissioner Pernell, and this
8 question is for -- we have someone on the line
9 from the Coastal Commission?

10 MR. LUSTER: Yes, sir, I'm here.

11 MR. REEDE: Tom Luster is the Coastal
12 Commission person.

13 PRESIDING MEMBER PERNELL: Good morning,
14 Tom.

15 MR. LUSTER: Good morning.

16 PRESIDING MEMBER PERNELL: Under visual
17 resources the Coastal Commission has some issues
18 with visual resources?

19 MR. LUSTER: That's correct. Our
20 Commission provided a letter at its March meeting
21 that laid out some of the concerns on the visual
22 aspects of the proposal.

23 PRESIDING MEMBER PERNELL: And is that
24 the only issue that the Coastal Commission has?

25 MR. LUSTER: No. The other most

1 significant issue from our perspective is the
2 biological resource issue. And the letter that
3 our Commission approved just a couple of days ago
4 is focused on the need for determining the
5 entrainment impacts of the proposed project, the
6 whole 316B study issue.

7 Those are the two primary areas of
8 concern we have.

9 And we also are going to be reviewing
10 the recently received soil and groundwater
11 information. And we have some concerns about
12 shoreline hardening associated with the proposal.

13 But the two primary ones right now are
14 visual and biological resources.

15 PRESIDING MEMBER PERNELL: All right.
16 Tom, help me out on the 316B study. My
17 understanding is that the Coastal Commission did a
18 study and grandfathered certain projects or areas
19 into it?

20 And that that study would be, well, that
21 grandfathering went in in about three years or so.
22 Is that -- I'm just going from memory, so I
23 can't --

24 MR. LUSTER: Okay, --

25 MR. REEDE: Excuse me, Commissioner

1 Pernell. We have our biological resource people
2 here that can -- and also on the phone, that can
3 better discuss the 316B efforts. And I think
4 their input is critical to give you a better
5 understanding of the status of 316B studies.

6 And I'll be quiet and I'll let --

7 PRESIDING MEMBER PERNELL: Well, let me
8 just -- I'm trying to find out what's the Coastal
9 Commission rule, if there's one, in relationship
10 to the 316B study.

11 MR. LUSTER: Well, briefly, our rule for
12 coastal industrial development in general is that
13 the adverse environmental impacts be mitigated to
14 the maximum extent feasible. That's the language
15 from the Coastal Act.

16 And in order to determine what the
17 environmental impacts are and the feasible
18 mitigation measures, we need some of the very
19 basic data that an entrainment study would
20 provide.

21 And given that for this particular
22 facility the only entrainment information is now
23 over 20 years old, and it's from the facility some
24 distance up the coast, we don't really have the
25 information we need to base our finding of

1 environmental impact and mitigation measures on.

2 And so absent that we're kind of stuck
3 knowing that we're dealing with an impaired water
4 body, we're dealing with a cooling system that
5 generally results in -- this type of cooling
6 system results in nearly 100 percent mortality due
7 to entrainment.

8 But we don't have anything more than
9 that to go on on the specifics of this location.
10 The biological community, how it's being affected,
11 and then what measures are necessary to avoid or
12 reduce those adverse effects.

13 PRESIDING MEMBER PERNELL: So this study
14 will give you the additional information you need
15 for your Board to be able to make a finding on
16 this project?

17 MR. LUSTER: Yes, I believe so. The
18 316B study is the standard method to determine
19 this type of impact for projects and facilities
20 such as this throughout the country, is my
21 understanding.

22 PRESIDING MEMBER PERNELL: Okay, thank
23 you.

24 MR. LUSTER: Um-hum.

25 MR. REEDE: Commissioner Pernell, I'd

1 like to introduce Mike Foster and Noel Davis and
2 Rick York, if you'd join us, please, to give you a
3 summary, a very brief encapsulation of our
4 biological resources efforts and the applicant's
5 entrainment report, and what we've done, and what
6 our sister agencies, more importantly, have also
7 done in relations to this.

8 Mike Foster, would you please start
9 for -- oh, Noel Davis, would you please start?

10 MS. DAVIS: Yes. In order to determine
11 the impacts of entrainment you have to know how
12 many organisms of at least some target species are
13 going to be sucked into the cooling water system.

14 And we were concerned because there were
15 no studies that were actually done at El Segundo.
16 And any studies that were done, there was one at
17 nearby Scattergood, were done over 20 years ago.

18 So, the applicant said there's a very
19 good database on plankton organisms from King
20 Harbor, which is about five miles away. And they
21 propose to use the King Harbor data to do
22 basically a paper 316B study.

23 And we said, well, we're willing to
24 pursue this with you. We have our doubts as to
25 whether you can use the King Harbor data as a

1 surrogate, but we're willing to let you
2 demonstrate that.

3 And the, I guess the bottomline is they
4 couldn't demonstrate that the number of organisms
5 per -- that are -- water column at King Harbor was
6 the same as at El Segundo.

7 So therefore, we don't -- the study
8 can't be done. Because you have to know basically
9 how many organisms there are, you know, per
10 thousand cubic meters, or whatever, of water
11 that's sucked through the system.

12 MR. ABELSON: If I could just add just a
13 couple comments very briefly, just on a process
14 level. These discussions have been ongoing for
15 basically about 16 months now. And it was the
16 desire of staff, the desire of the applicant, and
17 I think frankly the desire of the Hearing Adviser
18 to see if there was a way to resolve the
19 information, the dispute that exists with existing
20 data.

21 As a result of the scheduling order that
22 was issued in December, it reflected an intent by
23 the applicant to provide a supplemental study,
24 which they have provided. It's quite lengthy.

25 And as Noel Davis has just indicated,

1 and the data requests were, in part, directed to
2 getting further understanding of that study, it's
3 staff's conclusion and opinion that that study is
4 not adequate from a scientific basis to allow us
5 to make the conclusion that we're required to make
6 by law.

7 On the procedural issue that I think is
8 in front of you folks, because we're actually not
9 here to litigate this today, and that's not what
10 this hearing is about, the procedural issue that's
11 in front of you folks is number one, knowing the
12 status of where we are at on that. Because there
13 is a fundamental difference of opinion on this
14 issue.

15 And any decision that you all would
16 make, or not make, as you saw fit, that would
17 direct either staff or applicant in how to proceed
18 further at the moment on this issue. You may make
19 no decision at all, and just simply say it's an
20 issue that has to be litigated, and that would be
21 understandable.

22 But that's basically where we're at. We
23 do have three sister agencies who concur in that.
24 And that's the status of that issue at the moment.

25 PRESIDING MEMBER PERNELL: Okay, why

1 don't we hear from the applicant. Thank you, Mr.
2 Reede and staff.

3 MR. REEDE: You're welcome.

4 MR. McKINSEY: There have been a
5 tremendous number of false and incorrect
6 statements made in the last half an hour. There
7 have also been incredible amount of what I would
8 call litigation by surprise.

9 As an example, I'm just being told that
10 there is a letter that's being docketed reflecting
11 apparently a series of communications and input
12 that the Energy Commission has been giving
13 National Marine Fisheries, thus producing a
14 letter, which I have not even seen yet. I was not
15 even aware of any kind of communications
16 occurring.

17 And one of the reasons that concerns me
18 is that the only way to have an effective public
19 process is to insure that any agency that's making
20 a decision is given all the information, and given
21 all the different perspectives on that information
22 as possible.

23 As just one simple example of the false
24 statements that are occurring, and something we've
25 corrected for a year now, maybe a year and six

1 months, is that the original 316B study was,
2 indeed, conducted at '79 to '82. However, it did
3 not use data from 55 miles away. It is titled,
4 the Ormond Beach Generating Station 316B study.
5 But it did not use Ormond Beach data from Ventura
6 County in order to determine the impacts of the El
7 Segundo project. It used local data.

8 That is a complete false statement. It
9 was originally stated in some comments that were
10 made in the data adequacy recommendation when this
11 project was accepted as data adequate. And we've
12 corrected that because it was also used in
13 background to data responses.

14 We have corrected it twice at workshops.
15 And now I'm hearing the Energy Commission continue
16 to repeat that mantra. I've just heard the
17 Coastal Commission say that mantra. And it
18 wouldn't surprise me if they've been told that at
19 National Marine Fisheries and the California
20 Department of Fish and Game, that they've been
21 given either incorrect information, or incomplete
22 information.

23 Another continuous statement that I hear
24 is that the only piece of information that is
25 available is either old studies or this new

1 comparison that we just did with King Harbor. And
2 we disagree with that.

3 We disagree with an amazing amount of
4 statements. And the one reason I'm probably the
5 most upset relates to what Mr. Abelson just said,
6 he didn't come here to litigate biology today.
7 There is also no motion that I'm aware of, and
8 there was no order asking that you consider things
9 such as ordering a 316B study, delaying the
10 project, and other things.

11 And if that's the path we're taking,
12 that needs to be fully briefed and that needs to
13 be fully considered with all the correct
14 information in place.

15 At an absolute minimum --

16 PRESIDING MEMBER PERNELL: Well, let me
17 stop you there. The path we're taking now is to
18 find out the status of the project. So,
19 regardless of who says what, I think the decision
20 rests at the head of the table. So, please don't
21 misconstrue anything anyone else is saying, other
22 than myself.

23 MR. MCKINSEY: Okay. It's very hard to
24 hear a lot of statements being repeated that we
25 disagree with. And we didn't come here today to

1 try to litigate biology. We obviously have a very
2 large difference of opinion on biology. And we
3 came here to discuss the schedule and moving
4 forward.

5 Unfortunatley, and it's difficult to
6 resist not responding to those things, when we
7 know that you, the decision maker, are hearing a
8 lot of arguments, and if we don't counter them and
9 explain our own positions, we would be concerned
10 that you may form a premonition or a mindset prior
11 to hearing all the evidence.

12 And what I would like to ask and to
13 remind is that we're not trying to counter all
14 those statements and arguments today. We came
15 here to discuss schedule. And we have a lot of
16 difference of agreement on several areas.

17 And I just want to briefly kind of
18 indicate where there are some things that I want
19 to correct, because they reflect schedule issues.

20 The soil and water information that we
21 just submitted were not really new data responses;
22 they reflect a continuing filing of copies of any
23 of the studies that we come across or new
24 reporting that we get in the area of soil and
25 water.

1 So in the last few weeks several times
2 we have docketed the five copies of reference
3 studies and other ongoing reporting obligations in
4 the area of soil and water.

5 The visual proposals that we want to
6 submit on May 10th reflect an effort on our part
7 to embrace the concerns and the desires of the
8 community surrounding the power plant. And also,
9 in part, the Coastal Commission's desire to see
10 some type of treatment on the facility, on the new
11 units.

12 And we believe that these proposals are
13 a very good thing, because they will allow issues
14 to be resolved and mutual agreement to be achieved
15 in the area of visual. And I think they will also
16 go great lengths towards bringing more community
17 satisfaction with this project.

18 Those proposals are being submitted as
19 just that, proposals that we'd like to have a
20 public workshop on. And we had conferred with the
21 staff regarding the way that we can schedule and
22 structure this.

23 And so on the basic idea of schedule,
24 we're in agreement that we would like to submit
25 visual proposals by May 10th; have a public

1 workshop; and then have a staff assessment
2 supplement produced. And I don't propose to say
3 when the staff would do something, but I think 45
4 days is indeed a fair period of time from the date
5 we submit those submittals.

6 The project that we are proposing to the
7 California Energy Commission and to the State of
8 California is still the one that we had proposed,
9 which is to use existing operating intake
10 structures and cooling systems. And make better
11 use of those by removing antiquated old and
12 inefficient equipment with state of the art brand
13 new, producing for a lower heat discharge much
14 more megawatts with a smaller marginal increase in
15 the amount of natural gas.

16 In other words, the State of California
17 benefits by using an existing intake and facility
18 to generate more megawatts with less impacts
19 overall.

20 In some issue areas we can't say that
21 there is a reduction in impacts. In other areas
22 we can. And the big picture of what this project
23 is about often gets lost. But this is not a new
24 facility. This is not a new intake structure.
25 This is not even the restarting of a dormant idle

1 intake structure. This is taking an existing
2 operating cooling system and better utilizing it.

3 The goal of our project is, indeed, to
4 provide a very efficient production of power and a
5 more efficient production of power which benefits
6 both the applicant and the State of California in
7 terms of another precious resource we have, which
8 is natural gas and our limited supplies.

9 The project that we had proposed was
10 designed and intended to make use of existing
11 information and data. We specifically designed
12 this project not to touch or affect our intake
13 system. And for that reason, one of the reasons
14 we did that is because there is an agency, the
15 L.A. Regional Water Quality Control Board, that is
16 the sole agency tasked with enforcing the Clean
17 Water Act. And the numbers 316B is the section
18 enforced by -- it's a section of the Clean Water
19 Act enforced by L.A. Regional Water Quality
20 Control Board.

21 The project that we have proposed is the
22 project that we want to have a decision on. And
23 if that decision is a disapproval, which we don't
24 think it should be, but if it is, then that's what
25 we can live with.

1 However, we do not have a desire, and we
2 are not wishing to perform new studies and create
3 a new intake system with modifications, except to
4 the extent that we're going to be mandated to do
5 that, in fact all once-through cooling systems in
6 the State of California will probably have to go
7 through something to that effect over the course
8 of the next five to ten years, as part of the new
9 316B regs that are coming out. And that all the
10 regional boards will be enforcing.

11 That's the time when we want to address
12 what the intake structure will be and how it will
13 operate. And at this time what we would like is a
14 decision as to whether or not this project
15 complies with LORS and does or does not have
16 significant impacts.

17 And we have a strong disagreement over
18 the biological resources area. I think that's the
19 only area where we have a strong disagreement.
20 And provided that we use a schedule giving
21 ourselves 45 days from the time we get visual in,
22 I think there's a good potential to resolve all
23 other issues such that biology, perhaps, may be
24 the only issue that really has to get thought out
25 and decided. It will be probably the deciding

1 factor as to whether this project can be approved
2 or not.

3 In essence, the issues surrounding air
4 quality may also, those are a new thing and we
5 have not seen a staff assessment regarding exactly
6 what their position is on the Air District's
7 determination of compliance. So we really can't
8 comment on specifics as to how we are going to
9 react to that. But I get the sense that that may
10 also become an issue that we may have to discuss
11 in evidentiary hearings, because we may have a
12 disagreement over that, also.

13 But until we actually have a staff
14 assessment that's responding to the final
15 determination of compliance, and has a rationale
16 and an explanation under the California
17 Environmental Quality Act to why the Energy
18 Commission is going to require more than the Air
19 District is requiring, we don't have really any
20 ability to respond to that. So that is another
21 potential issue.

22 But in any case, none of these events
23 would preclude us being able to proceed on a
24 schedule in which we would be able to hold
25 evidentiary hearings this summer and reach a

1 decision in the late summer or early fall on this
2 project. And that's what we would like to get.

3 PRESIDING MEMBER PERNELL: Couple of
4 questions. What I'm hearing you say is visual
5 resources, you're going to submit additional
6 information. And soil and water. What about
7 noise? Did I miss that?

8 MR. REEDE: That's pretty much --

9 PRESIDING MEMBER PERNELL: Noise is
10 okay?

11 MR. REEDE: -- solved.

12 MR. MCKINSEY: We have a proposal on the
13 table that has not been resolved yet, as to a
14 reduction of noise coming from unit four. And I
15 think, as part of the visual information we're
16 submitting, part of which focuses on the south end
17 of the property and a lot of the community
18 concerns, that noise issues -- in addition, we're
19 going to have a staff assessment, which is going
20 to have some new analysis of noise, I have a
21 feeling that we're going to be able to resolve the
22 remaining noise issues, both at a community level
23 and with the Energy Commission. And that's
24 something we're striving to do.

25 PRESIDING MEMBER PERNELL: Okay.

1 MR. ABELSON: Commissioner, if I could
2 just ask one question for clarification. We have
3 a couple folks on the phone that I know the noise
4 issue has been important to, both the City of
5 Manhattan Beach and I believe Ms. Murphy at a
6 minimum. There may be other community members.

7 And just for a current accurate
8 assessment of where we're at on that, it might be
9 reasonable to give them a minute to speak on those
10 issues.

11 PRESIDING MEMBER PERNELL: Okay. Why
12 don't we hear from those on the phone.

13 HEARING OFFICER SHEAN: While we're
14 still on this 316B and the existing NPDES permit,
15 am I hearing you to say that the applicant's
16 assertion will be that you have a valid permit and
17 therefore can operate your modernization project
18 under the umbrella of that existing permit? And
19 that only when the Water Quality Control Board is
20 exercising its federalized function to renew your
21 permit would the applicant be willing to, at that
22 point, conduct any studies and abide by whatever
23 results the Board comes up with in terms of
24 potential impact mitigation?

25 MR. MCKINSEY: That's fairly close to

1 being accurate. As to LORS compliance, other than
2 CEQA, we believe that we have a valid NPDES permit
3 and it's subject to its renewal processes which
4 probably will, indeed, require us to do studies
5 not just for this intake structure we're using
6 here, but the other one at El Segundo; Scattergood
7 next door will have to go through this.

8 And those will be regulated by the Los
9 Angeles Regional Water Quality Control Board.
10 Perhaps in a few years, perhaps in five or ten
11 years from now, depending on how quickly and how
12 they work with the new regulations when they
13 finally do become final, probably in 2004.

14 But as to CEQA, we've had several
15 explanations. One is because this is a
16 continuation of an existing use, we've maintained
17 all along that we believe there is case law that
18 supports that there are no net increases or
19 impacts associated with the intake and the cooling
20 system that have to be evaluated under CEQA, both
21 direct and cumulative.

22 But besides that, we believe tat we've
23 provided three different means, and perhaps four,
24 of assessing impacts associated with that intake
25 structure. And that even if you take all of the

1 impacts of that intake structure running 100
2 percent of the time for 30 years, they are not
3 significant.

4 And so in addition to saying that
5 there's a legal argument that they don't even
6 count, we also believe that we can have and
7 present evidence that under CEQA it would be
8 satisfied, even if you counted 100 percent of the
9 impacts of the intake structure.

10 And that's the fundamental disagreement
11 we have with the staff is that the staff feels
12 that the information we have provided does not
13 allow a biologist to make an estimate of the
14 impacts of the intake structure, and thus does not
15 allow them to make a determination that the
16 project does not have significant impacts.

17 HEARING OFFICER SHEAN: My recollection
18 of a staff workshop, I think it was on July 9th in
19 El Segundo, was that the Water Quality Control
20 people said that their NPDES review had an
21 environmental CEQA component. So that at the time
22 that they issued the permit that they had performed
23 a CEQA-like or NEPA-like review. Is that --

24 MR. McKINSEY: The NPDES renewal occurs
25 every five years, so that it just occurred two

1 years ago, it will occur again in three years, and
2 again five years later, has to include a CEQA and
3 NEPA, because it's satisfying the Clean Water Act
4 equivalency determination. So they have to
5 consider all aspects.

6 They tend to focus primarily on section
7 316A and B of the Clean Water Act, and also on all
8 of the urban stormwater runoff related issues.
9 But it acts and they're responsible for, every
10 time they renew the permit, satisfying the
11 California Environmental Quality Act and the
12 National Environmental Protection Act, CEQA and
13 NEPA.

14 And they had indicated that our existing
15 316B permit, our NPDES permit, under their
16 interpretation and actually under the regulations
17 in place at the time, and under regulations that
18 were drafted at the time, that we would qualify
19 not as a new facility, but as a continuation of an
20 existing one. And that was why we do not have to
21 get a new NPDES permit. And they would not
22 require new 316B studies.

23 HEARING OFFICER SHEAN: Since the
24 evidentiary hearings are really designed to
25 address disputes of fact, we may have an

1 underlying dispute of law, which may need to be
2 addressed in an interlocutory and preliminary way.

3 Because I guess one of the potential
4 questions is whether or not the position of the
5 staff essentially is that notwithstanding the
6 valid NPDES permit, that it cannot be used to
7 support the operation of the project as proposed.
8 Fundamentally that's your position, is it not?

9 MR. ABELSON: Yes. I think that it
10 basically can be used for purposes of determining
11 LORS compliance. But because it is clear, as a
12 matter of fact, and there's no dispute about this,
13 that there was no entrainment analysis done by the
14 Water Board as part of its reissuance two years
15 ago at the facility, it cannot be used to answer
16 the CEQA question, is the entrainment causing a
17 significant impact or not.

18 And I do acknowledge Mr. McKinsey's
19 point that --

20 HEARING OFFICER SHEAN: Well, let me ask
21 you --

22 MR. ABELSON: -- because -- if I could
23 just finish for one more second --

24 HEARING OFFICER SHEAN: Yeah.

25 MR. ABELSON: -- his point that there is

1 a legal question which we're confident of
2 prevailing on as a matter of law, as to whether or
3 not the baseline, you know, is existing permit
4 levels or not. If it were, then obviously this
5 would all be moot.

6 However, it's been my opinion and
7 remains my opinion, that that is a straight-up and
8 straightforward legal issue, but is best evaluated
9 by the Hearing Officer and by the Committee, after
10 you've heard the underlying evidentiary dispute
11 which will allow you to determine whether simply
12 as a factual matter there are issues that are of
13 concern to you.

14 When you hear that dispute, which is an
15 evidentiary matter, and I fully acknowledge
16 counsel's point on that, I think that at the end
17 of that you will then have two things in front of
18 you, a brief that will argue the facts that were
19 presented on both side, and the law, as to whether
20 or not there is a baseline question or not.

21 And you can then render a complete
22 decision on the matter.

23 If we were to get an interlocutory
24 ruling on the issue, it would concern me, as an
25 interlocutory matter, because it's so fundamental

1 to the merits of the case, that one or the other
2 side might have every reason to want to then take
3 it to the full Commission, if they were going to
4 be foreclosed from presenting their case, or if
5 they lost, for example, and had to present their
6 case.

7 So, I'm urging, as a process matter,
8 that while there is, I agree and acknowledge that
9 there is a legal issue that will have to be
10 briefed to some point, I'm urging that that be
11 done after the evidentiary hearings as part of the
12 briefing on the whole matter.

13 MR. LUSTER: This is Tom Luster with the
14 Coastal Commission, and I have a few comments.

15 HEARING OFFICER SHEAN: Sure, go ahead.

16 MR. LUSTER: Several different issues I
17 want to address right now. First, regarding the
18 validity of the NPDES permit, we're not
19 questioning that at all. This is not an issue of
20 compliance with the Clean Water Act as far as
21 we're concerned. We're just looking for
22 conformity to Coastal Act requirements, which are,
23 in a number of instances, somewhat different than
24 what would be required under the Clean Water Act
25 and the state water quality standards.

1 What we're looking for here is
2 compliance with Coastal Act policies that
3 essentially state that adverse environmental
4 effects are mitigated to the maximum extent
5 feasible. And, as I said earlier, we need some
6 baseline information on what the effects are, what
7 the adverse effects are, and then what mitigation
8 measures are available and feasible to address
9 those.

10 That's somewhat different than what the
11 Regional Board may have looked at at the time.
12 And it's also different than the CEQA requirement
13 that denotes significant adverse impacts.

14 One of the fundamental data requests
15 that we haven't received yet is in regards to the
16 baseline for what we're looking at in this
17 facility. Based on the information I've seen from
18 the California Independent System Operator, the
19 units one and two have been essentially shut down
20 most of the past couple of years during this
21 review period.

22 And so the existing conditions are that
23 the facility is drawing much less ocean water for
24 cooling right now. If this new proposed project
25 was built, the new units apparently are to provide

1 a baseline electrical supply, they would result in
2 an essentially continuous use of 200 million
3 gallons a day of ocean water that is currently not
4 being used.

5 And that increase in use of cooling
6 water is significant in our mind, and represents a
7 very likely great increase in entrainment effects
8 of the proposed project.

9 I'm also concerned that Mr. McKinsey is
10 referring to some draft EPA rules on existing
11 intake structures that have just been released,
12 and they're not final yet. So based on a change
13 over the course of the comment period that is
14 occurring right now, I believe is scheduled to
15 continue over the next couple months. So we don't
16 know what's going to happen with changed
17 requirements for existing intake structures.

18 One final note. I am looking at the
19 original 316B study here, which states that
20 entrainment data from Ormond Beach Generating
21 Station was used to estimate daily entrainment at
22 El Segundo Units One, Two and Units Three and
23 Four. And so I'm not aware of another 316B study
24 that's been referenced as applicable to the El
25 Segundo plant, other than this one using Ormond

1 Beach data.

2 So, I know I've raised a lot of issues
3 in this short time, but when I look at these
4 issues comprehensively, it says to me that we need
5 additional and more recent information in order to
6 make our determination of impacts and develop the
7 specific provisions that would allow the proposal
8 to conform to Coast Act policies.

9 HEARING OFFICER SHEAN: This is Garret
10 Shean again. Maybe for purposes of trying to set
11 up our evidentiary proceedings later, and given
12 that staff is doing something in terms of
13 alternative cooling options, let's assume
14 hypothetically for purposes of this discussion
15 that one could find that there might be some
16 significant impacts from the existing intake
17 structures.

18 What's the available mitigation then?
19 And will the staff's alternative cooling study
20 include any description of what options would be
21 available to the Commission if we had, let's say,
22 reviewed the matter, found a potential impact, and
23 are looking for feasible mitigation, what options
24 are there?

25 MR. YORK: Are you talking about

1 biology, you know, habitat type mitigation?

2 HEARING OFFICER SHEAN: I'm talking
3 about either of the habitat mitigation or
4 mitigation that can be applied to the structures
5 that tend to reduce the entrainment of aquatic
6 organisms, and things like that, so that we have
7 at least some idea if we were to find something
8 what could we do about it. That's the essential
9 question.

10 MR. YORK: Well, I'd like Noel Davis to
11 talk about that, because she works and lives down
12 there, and she probably is the best source of
13 habitat type information ideas that may be
14 available in the local area.

15 MR. REEDE: It's sort of a --

16 MR. ABELSON: The question, I think --

17 MR. REEDE: -- two-part question --

18 MR. ABELSON: -- it goes to the
19 alternative cooling study, per se, I think
20 initially, because --

21 MR. REEDE: Right.

22 HEARING OFFICER SHEAN: Well, I just
23 want to know whether you're going to include that.

24 MR. ABELSON: -- that's actually
25 underway.

1 MR. REEDE: Well, yes, as far as
2 alternative cooling study, what we're looking at
3 are a number of a different options that could
4 potentially mitigate all biological impacts, or
5 potential biological impacts; or minimize to the
6 extent feasible, biological impacts.

7 And typically, in an alternative cooling
8 option study we look at a number of different
9 methods for cooling the equipment. And they take
10 into account the full spectrum of -- we look at
11 wet cooling, dry cooling, wet/dry hybrid; we look
12 at reclaimed water. We look at a number of
13 different options --

14 HEARING OFFICER SHEAN: My question is
15 very simple. Are you looking at what mitigation
16 could be applied to this once-through ocean
17 cooling if there were a determination that there
18 was a --

19 MR. ABELSON: Yeah, the answer, --

20 HEARING OFFICER SHEAN: -- a potential
21 impact.

22 MR. ABELSON: -- Mr. Shean, is yes. And
23 that study is underway, and it will be completed
24 in the relatively near future. And we hope to
25 incorporate it in our supplement.

1 So the answer to your question is yes.

2 HEARING OFFICER SHEAN: Okay.

3 PRESIDING MEMBER PERNELL: So that on
4 the timeline for your study, though, is that
5 just -- can you define that a little?

6 MR. REEDE: Yes, it's currently in the
7 review cycle, management review cycle.

8 PRESIDING MEMBER PERNELL: So you would
9 say --

10 MR. REEDE: Within the next 30 days it
11 would be available.

12 PRESIDING MEMBER PERNELL: A month,
13 okay.

14 MR. ABELSON: However, I think what
15 we're anticipating is that we need to collect all
16 of the outstanding data that the applicant is
17 going to provide us with regard to their study.
18 There's still a couple of pieces of information
19 that I believe will be forthcoming in the next
20 couple of days, as Mr. McKinsey has indicated.

21 We need to update and revise and
22 finalize the staff supplement in general, but
23 particularly obviously there's been major new
24 information from the applicant along the way, with
25 regard to their supplemental analysis.

1 And so whatever time is on the schedule
2 here for simply finalizing the staff's
3 supplemental report on all topics, that would be,
4 I would think, the timeframe that we would look at
5 for including the alternative study, as well.

6 MR. REEDE: But I think Hearing Officer
7 Shean's question may not have been answered,
8 because he was looking at how would the
9 alternative cooling mitigate the impacts of the
10 intake. I believe that's what you said?

11 HEARING OFFICER SHEAN: My question
12 is --

13 MR. REEDE: Okay, --

14 HEARING OFFICER SHEAN: I'm going to
15 repeat my question.

16 MR. REEDE: Okay.

17 HEARING OFFICER SHEAN: All right. Will
18 your alternative cooling study include potential
19 mitigation for once-through ocean cooling to the
20 existing structures or processes that would
21 mitigate any potential environmental impact from
22 the entrainment of aquatic organisms?

23 MR. ABELSON: The answer's yes.

24 MR. REEDE: Yes. Okay.

25 HEARING OFFICER SHEAN: Now I just have

1 a question for Mr. McKinsey here. The staff
2 apparently would like not to have an interlocutory
3 determination on the legal issues, and let me say,
4 combine the factual and legal issues for the
5 evidentiary hearing. Do you have a view on what
6 you'd prefer?

7 MR. MCKINSEY: There's another
8 procedural reason that might be desirable to not
9 make a ruling on our legal argument, and that is
10 in addition to an interlocutory appeal and an
11 appeal to the full, there's also an appeal option,
12 and perhaps several appeal options, to a decision
13 that the Commission might render.

14 And if we were to determine now that our
15 argument is accurate in full or in part, thus some
16 or all of the operation of intake number one is
17 not part of the project, and the assessment of
18 impacts did not address that, and then say there
19 was an appeal made afterwards, we may not have had
20 a complete evaluation of the project, such that it
21 would survive an appeal.

22 In other words, the appeal might force
23 it to come back to the Energy Commission to repeat
24 something.

25 It would be much better, if there is any

1 issues that get appealed post-process regarding
2 this issue surrounding CEQA, that if we actually
3 do an analysis considering all impacts, and we
4 actually do address this issue completely in
5 evidentiary hearings, then we will have completed
6 all the evidentiary needs we might have, so that
7 regardless of what the decision is, and regardless
8 of what happens in appeals, that we're done with
9 that part of it. We're done dealing with what the
10 facts might be as to what impacts are. We've
11 fully addressed that and investigated that.

12 However, there is some appeal, and then,
13 we don't have a current position because I haven't
14 advised the client on these issues. But there is
15 some appeal to doing something earlier if it
16 removes a contentious issue from the table.

17 In other words, if it was otherwise
18 necessary. There could also be some advantage to
19 briefing it now, and the Committee might not have
20 to make a decision, could choose not to, or choose
21 to make the decision, or fold that into the later
22 process.

23 HEARING OFFICER SHEAN: Well, what's
24 very clear is that if we wait until after the
25 evidentiary hearings it essentially is going to

1 surcharge both the parties in terms of the
2 material they have prepared and the Committee.
3 And by that I also mean the Hearing Officer, and
4 that there is just no way that the time that
5 you've provided in here in this proposed schedule
6 is going to be adequate to not only address the
7 factual issues, but also I think what we would all
8 agree is a significant legal issue.

9 So, that would be the impact on the
10 schedule if we combine all this, and don't do it
11 in an interlocutory way.

12 So, anyway, but I understand basically
13 the position of the parties, and probably the best
14 way is to handle it all together at once. And
15 then give the Committee sufficient time to work it
16 through.

17 MR. REEDE: Commissioner Shean, may I
18 for staff --

19 HEARING OFFICER SHEAN: Thank you for
20 the promotion, there.

21 MR. REEDE: I'm sorry, --

22 (Laughter.)

23 MR. REEDE: -- Hearing Officer Shean,
24 may I inject staff's take on this, since we are an
25 independent party to this proceeding.

1 With the 316B study you would have a
2 year's worth of sampling, basically, at the
3 plant's intakes. To actually wait until
4 evidentiary hearings and eventually a decision,
5 we're losing critical time, because it does take a
6 year.

7 It's too late to gather the most
8 comprehensive data during the springtime. But, in
9 the event that a 316B study would be required,
10 we're still putting it out further and further and
11 further before they could begin construction. And
12 we're dragging staff's resources out further and
13 further and further.

14 HEARING OFFICER SHEAN: Okay, well if I
15 understand --

16 MR. MCKINSEY: If I can just say one
17 thing, though, there's two issues. One of them is
18 whether or not, what the scope of the impacts that
19 have to be considered as part of this project.
20 That's what we're discussing right now.

21 That's separate from an issue as to
22 whether or not there is adequate data to assess
23 the impacts of the project.

24 And that's what you're addressing, and I
25 don't think you could make that determination

1 until after you've held evidentiary hearings
2 because we've got parties on both sides saying
3 there is and there is not enough data.

4 And the only way you're going to do that
5 is to actually litigate that issue, to hear what
6 the evidence is and what the science is, and
7 render a decision.

8 I don't know how the Committee can make
9 a decision as to whether or not additional studies
10 are or are not necessary to make an evaluation
11 until after they've heard all the parties --

12 HEARING OFFICER SHEAN: Well, if I heard
13 you correctly earlier, you said that you're not
14 going to conduct that 316 study, you're looking
15 for a turn-down instead of the Committee or
16 Commission directing you to conduct the study, is
17 that not --

18 MR. McKINSEY: Correct. If a decision
19 was rendered that ordered us to conduct a study,
20 and that would then determine impacts, that would
21 not be an acceptable decision as a business risk
22 to proceed with the project by the applicant.

23 And so it would be the equivalent of,
24 even if there was a positive decision that said do
25 that, it would be the equivalent of a disapproval.

1 And then the project would not come to fruition,
2 and the conditions of certification would not be
3 accepted by the applicant, and it would go away.

4 MR. ABELSON: Mr. Shean, could I just
5 add one comment on your observation a moment ago
6 about the scheduling impact of the briefing issue?

7 Let me offer a suggestion that I
8 certainly haven't discussed with applicant, but I
9 would float for everybody's consideration in light
10 of the comment that you've made.

11 There is an alternative study, cooling
12 study analysis that's being worked on. There are
13 other discussions, continuing discussions, and I
14 think constructive discussions, between the
15 applicant and ourselves regarding any other way to
16 resolve this issue that's possible, and I don't
17 have any idea at the moment whether those are
18 going to bear fruit or not, but they're being
19 pursued to see if there's any technical basis at
20 all for doing it.

21 Given that, and given the concern that
22 you raised, which I respect and understand both,
23 in terms of the timing issue at the back-end, I
24 would suggest that, at a minimum, defer briefing
25 on the legal issue until we're approaching the

1 time of hearings, or as a prehearing motion or
2 something like that. And the papers could be
3 filed coincident with the testimony or whatever,
4 so that you have it, you have it under submission.

5 In point of fact, there is primarily one
6 major issue, legal issue that's at stake. It will
7 certainly involve serious briefing, undoubtedly,
8 but it is only one legal issue, at least that I'm
9 aware of at the moment, that's contentious in this
10 case.

11 So, I think for a lot of reasons it
12 would be desirable to let this matter go for a bit
13 longer, and see if there's ways to work this
14 through. I'm very concerned, genuinely concerned
15 about the precedent implication of the decision
16 either way.

17 And I suspect strongly that from staff's
18 perspective this is an issue that is not likely to
19 be resolved entirely at a Committee level on the
20 law, because it is precedential.

21 And so if we can figure out a way to get
22 through the evidentiary piece and/or to reach some
23 other resolution of the issue, I think that is
24 desirable, if possible. And I am offering a
25 process that I think would maximize that

1 opportunity.

2 HEARING OFFICER SHEAN: Well, and that's
3 why I asked the question of whether your
4 alternative study includes a description of
5 mitigation so that if you assume that we had an
6 evidentiary proceeding and a legal briefing, and
7 we got to the position of yes, we could consider
8 the environmental impacts, and yes, that there
9 were potentially some, what would we do about it?
10 Because CEQA basically requires you to do what's
11 feasible. And you got to find out what's
12 feasible. And I assume that's going to be in your
13 report, right? And you're nodding yes, so I want
14 the record to reflect that.

15 MR. MCKINSEY: And as I was going to, on
16 the topic of an alternative cooling study, we have
17 already presented an alternatives analysis. There
18 could be multiple positions on what potential
19 alternatives are available, and whether or not
20 they're required. And that's part of -- the
21 Committee would have to make a decision as to if
22 they believe there are significant impacts, then
23 what mitigation they're going to require for
24 those.

25 And all I hear the staff indicating is

1 that they want to include, as part of their staff
2 assessment supplement, or at least prior to
3 evidentiary hearings, that additional alternatives
4 analysis, other than what was already in the
5 original staff assessment.

6 In other words, they want to complement
7 or improve or replace the alternatives analysis
8 they've already completed. To me, that's fairly
9 routine and normal in the fact that, in other
10 words, they feel there are some other alternatives
11 they want to better explain or explore and
12 present.

13 And that's clearly, you know, that's
14 part of the staff's responsibility --

15 PRESIDING MEMBER PERNELL: I think he
16 Committee has heard enough on this particular
17 issue. I understand there is someone on the phone
18 that might want to talk about visual?

19 HEARING OFFICER SHEAN: Right. I think
20 we should allow our teleconferencers to proceed to
21 any of your comments. And it basically can be on
22 any subject matter. So why doesn't somebody lead
23 off, if you wish.

24 Mr. Cripe?

25 MR. CRIPE: No comment.

1 HEARING OFFICER SHEAN: All right. Ms.
2 Murphy?

3 MS. MURPHY: No comment.

4 HEARING OFFICER SHEAN: Either Ms.
5 Jester or Mr. Wadden from Manhattan Beach?

6 MR. WADDEN: Our only question would be
7 as to what is the status of our --

8 MR. REEDE: Mr. Wadden is speaking.

9 HEARING OFFICER SHEAN: And I guess with
10 the applicant's indication that they intend to
11 supply more visual information on May 10th, I
12 don't know whether that's going to be sufficient
13 to satisfy you. Can we leave the matter pending
14 until you get a chance to see what they provide
15 you?

16 MR. WADDEN: Sure. Absolutely.

17 HEARING OFFICER SHEAN: All right. Then
18 why don't we just basically put a little bit of
19 the burden on you. If you feel it is insufficient
20 and there's something more, to let the Committee
21 know and then we'll pick it back up again.

22 MR. WADDEN: All right, we'll do it that
23 way.

24 HEARING OFFICER SHEAN: All right. Mr.
25 Luster, anything further from you?

1 MR. LUSTER: Nothing at this point,
2 thank you.

3 HEARING OFFICER SHEAN: All right.
4 Anything that the Commission consultants want to
5 add? Ms. Davis? Mr. Kanemoto?

6 All right. I think we've exhausted the
7 list as far as I know in terms of who has called
8 in.

9 Let's just go off the record here for a
10 couple of seconds.

11 (Off the record.)

12 HEARING OFFICER SHEAN: All right, I
13 think on the basis of the discussions that we've
14 had we understand that the staff's motion to
15 compel is essentially withdrawn, given the answers
16 and data responses submitted by the applicant.

17 On the pending Manhattan Beach motion to
18 compel, we're going to leave that in abeyance
19 until Manhattan Beach has had an opportunity to
20 examine the applicant's filings on visual
21 resources currently scheduled for May 10th.

22 With respect to the schedule, the
23 Committee is going to take the proposed schedule
24 at the back of the staff's filing, as well as the
25 back of the applicant's filing, and try to work

1 something out and get it back to you, the parties,
2 as soon as possible, I guess is the best way to
3 say that.

4 So we'll leave it open now for the last
5 round of comments, if anybody wants to make any.
6 Otherwise, we're going to conclude this hearing.
7 And see you some other day.

8 Is there anything from anybody else?

9 All right, I'd like to thank everyone
10 for either attending here in Sacramento, or the
11 effort you made to call in. We appreciate it, and
12 we appreciate your comments. And thank you very
13 much.

14 The hearing is adjourned.

15 (Whereupon, at 10:20 a.m., the hearing
16 was concluded.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,
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